

BRUCE ANDERSON

IBLA 82-1299

Decided May 4, 1984

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, denying a petition for reinstatement and determining that oil and gas lease NM 15072 (Okla.) expired by operation of law.

Affirmed as modified.

1. Oil and Gas Leases: Communitization Agreements--Oil and Gas Leases: Expiration--Oil and Gas Leases: Extensions

Under recent amendments to 43 CFR 3105.2-3 (published at 48 FR 33670 (July 22, 1983)), a communitization agreement affecting a Federal oil and gas lease may be approved retroactively and serve to extend a Federal lease, even when the agreement is not submitted to the Department until after the expiration date of the Federal lease, so long as the communitization agreement has been executed prior to the expiration date.

2. Oil and Gas Leases: Compensatory Royalty--Oil and Gas Leases: Expiration--Oil and Gas Leases: Extensions

A lease may be extended beyond its primary term under 43 CFR 3107.9-1 (1982) only where the lessee has been notified that the Department has made an initial determination that drainage is occurring and the lessee has informed the Department, prior to the lease expiration date, of his willingness to tender compensatory royalty in accordance with its determination or has actually tendered such royalty in response to an assessment before the lease expiration date.

APPEARANCES: C. M. Peterson, Esq., Denver, Colorado, for appellant; Robert J. Uram, Esq., Office of the Field Solicitor, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

By decision dated July 19, 1982, the New Mexico State Office, Bureau of Land Management (BLM), rejected a petition for reinstatement of oil and gas lease NM 15072 (Okla.), and held that the lease expired by operation of law upon the running of its primary term. Bruce Anderson, the lessee of record, has timely pursued this appeal.

Noncompetitive oil and gas lease NM 15072 (Okla.) issued on January 13, 1972, with a primary term of 10 years, in response to a simultaneous oil and gas lease offer drawn with first priority in a drawing held by the New Mexico State Office. The lease bore an effective date of February 1, 1972, and embraced a 40-acre parcel described as NE 1/4 SW 1/4 sec. 17, T. 18 N., R. 25 W., Indian meridian. Thus, under the terms of the lease, the lease would expire at midnight on January 31, 1982, unless it was eligible for an extension as provided by law. As of January 31, 1982, the records of BLM disclosed neither production under the lease nor actual drilling operations on the lease such as would serve to extend the lease under 43 CFR Subpart 3107.

On June 30, 1982, Anderson filed a petition with BLM seeking to "reinstate" the lease. In his petition, he noted that "through clerical error" a communitization agreement involving the Federal lease and the owners of other

working interests in sec. 17 had not been timely submitted to the Minerals Management Service (MMS). Anderson alleged, however, that he had paid in excess of \$100,000 as his share of the cost of drilling a well within the 640-acre spacing unit, which well had been successfully completed as a producing gas well. He argued, in effect, that it would be inequitable for him to lose this lease solely because of a clerical oversight in failing to timely submit the communitization agreement to the Department.

In its July 19, 1982, decision, the New Mexico State Office denied the petition to reinstate the lease on the grounds that the communitization agreement had not been filed with MMS until after the expiration date of the subject lease, and, thus, could not be retroactively approved so as to extend his lease. Accordingly, it held that the lease expired by operation of law on January 31, 1982, at the end of its primary term.

On appeal, counsel for appellant admits that the decision of the State Office denying reinstatement was correct so far as it went, there being no provision for reinstatement of an expired lease except where the lease has expired because of a failure to pay the annual rental for the 11th year of an extended term. ^{1/} Rather, counsel suggests that the initial predicate of the State Office was in error; namely, that the lease did not, in fact, expire. In order to examine counsel's contention it will be necessary to explore, in some detail, the factual background concerning the communitization agreement involved in this case.

^{1/} Technically, such a lease would terminate, not expire. See Getty Oil Co., 72 IBLA 39 (1983).

Appellant alleges that in December 1980, Mustang Production Company (Mustang) proposed the drilling of a well to test the Morrow formation in the NE 1/4 of sec. 17, T. 18 N., R. 25 W., Indian meridian. Subsequently, on April 2, 1981, the Corporation Commission of Oklahoma, pursuant to the application of Mustang, approved the establishment of a 640-acre drilling and spacing unit for sec. 17 for the production of gas and gas condensate (Order No. 187383). While this order effectively pooled all non-Federal royalty interests, it did not, under Oklahoma law, result in a pooling of any of the working interests.

Prior to the entry of the spacing order, however, Mustang had completed a well, Dishen #1-17, in the center of the NE 1/4 of sec. 17. This well was completed as a gas well in the Morrow formation on June 24, 1981. Appellant asserts that he paid his proportionate share of the cost of the well, his share being \$115,000, presumably pursuant to an informal agreement. First production from the well began on November 17, 1981.

On January 29, 1982, appellant received a letter from the District Oil and Gas Supervisor, MMS, informing him that a well had been completed in the Upper Morrow formation in the NE 1/4 of sec. 17, and noting that all of sec. 17 was included in a drilling unit pursuant to the Corporation Commission's order. He was, therefore, informed that he was required to submit an approved communitization agreement effective prior to the initial production from the well. The letter continued:

If an agreement is not submitted for approval, compensatory royalty will be assessed in the amount of the royalty rate for lease NM-15072 times the ratio of the acreage of lease NM-15072

within the spacing unit to the total acreage within the spacing unit times the total value of the production from the spacing unit well, on a monthly basis, effective the first of the month during which first production is established.

As noted above, no communitization agreement was submitted prior to lease expiration on January 31, 1982. Counsel suggests that this was because appellant "failed * * * to appreciate the inclusion of a Federal oil and gas lease within the pooled area and the need to file a formal communitization agreement with the Minerals Management Service" (Statement of Reasons at 3). Counsel contended that the Department itself had recognized the equities involved in similar situations by publishing proposed regulations which would permit retroactive approval of communitization plans filed with MMS after expiration of a Federal lease. See 47 FR 25252 (June 10, 1982) and 47 FR 28550 (June 30, 1982).

Counsel, however, did not premise the appeal on the applicability of these proposed regulations, but rather focused attention on that part of the letter from the District Oil and Gas Supervisor which adverted to the payment of compensatory royalties. Noting that under the applicable regulation, 43 CFR 3107.9-1 (1982), payment of compensatory royalties serves to extend the primary term of the lease, counsel argued that appellant was willing to pay compensatory royalties for the period extending from initial production to approval of the communitization agreement, and that this should have independently served to extend the lease.

Counsel pointed out that after the communitization agreement had been submitted to MMS in April 1982, it was returned to Mustang with instructions

to add the following statement: "All proceeds attributed to unleased Federal land included within the communitized area, i.e., the full 8/8ths, are to be placed in an interest earning escrow trust account until the land is leased or the ownership is established." Additionally, MMS required a substitute exhibit A showing tract 4 (NE 1/4 SW 1/4) as "unleased." A resubmitted communitization agreement containing these changes was approved on July 15, 1982, with an effective date of November 9, 1981, as Contract No. SCR 314.

Counsel argues that, in effect, MMS is contending that appellant's lease expired on January 31, 1982, because no production could properly be attributed to it, while at the same time it is asserting that a claim for pro rata production arose on November 9, 1981, which could only occur if, in fact, production was attributable to the leased lands.

Counsel contends that the assertion by MMS of its claim for pro rata production for the period from November 9, 1981, to January 31, 1982, necessarily constitutes a determination that compensatory royalty was due for that period. Counsel argues that if this is the case, lease NM 15072 (Okla.) did not expire on the running of its primary term because it was extended pursuant to 43 CFR 3107.9-1 (1982).

An answer was filed on behalf of BLM. In its answer, BLM, while noting that the facts were not in dispute, generally denied appellant's legal assertions. First, it argued that, in the absence of an approved communitization agreement, production from fee land within a State spacing unit cannot be attributed pro rata to Federal leases within the unit, citing Kirkpatrick Oil

Co., 32 IBLA 329, 331 (1977). Thus, BLM asserted that since there was no approved communitization agreement, the production from the Dishen #1-17 well could not serve to extend appellant's lease under 43 CFR 3105.2-3.

BLM suggested that the proposed regulations were not relevant for two different reasons. First, BLM pointed out that since they were merely proposed regulations, they could not be applied. Second, BLM argued that even if they had been in effect on February 1, 1982, they would not aid appellant since the regulation, as proposed, expressly provided that "[n]o retroactive approval of a communitization agreement may be made where the lease expired prior to execution of the agreement." 47 FR 28561 (June 30, 1982). BLM pointed out that in actual fact, appellant had not executed the communitization agreement until after the subject lease had expired.

Insofar as appellant's compensatory royalty argument was concerned, BLM noted that, while the regulations did provide that payment of compensatory royalty would extend the term of any lease for the period of time during which compensatory royalty is being paid (43 CFR 3107.9-1), not only was compensatory royalty not paid, it had not even been assessed. BLM noted that in Inexco Oil Co., 45 IBLA 377 (1980), this Board had held that the obligation to pay compensatory royalty does not arise until the lessee has had an opportunity either to drill or to show why compensatory royalty is not due. Inferentially, BLM was arguing that since neither situation had transpired, there was no obligation to pay compensatory royalty prior to the expiration date of the lease, and, thus, the lease could not be extended by 43 CFR 3107.9-1 (1982).

In response, counsel for appellant noted that the relevant MMS manual provision, section 641.2.3G, provides that where a prescribed spacing program, acceptable to the area supervisor, is in effect and communitization would be a logical method of protecting against drainage "the Federal lessees holding interests in the leases or tracts being drained will be notified accordingly. Compensatory royalty will be assessed and made effective as of the date of first production from the offending well, even though the date is prior to the date of notification." This provision, counsel contends, providing, as it does, for retroactive assessment of compensatory royalty, supports its view that the lease was extended by assessment of compensatory royalty.

Before analyzing the specific questions raised in this appeal, it is helpful to briefly review the applicable statutes. Noncompetitive oil and gas leases are issued with a primary term of 10 years. See 30 U.S.C. § 226(e) (1982). There are various avenues by which a lease may be extended beyond its primary term. Thus, any lease will continue beyond its primary term so long as oil or gas is produced in paying quantities. Additionally, actual drilling operations, which are conducted over the anniversary date of the lease, will extend the lease for a period of 2 years and so long thereafter as oil or gas is produced in paying quantities.

Additional provisions relating to extensions apply where the lease has been committed to a unit plan or pooling agreement. See 30 U.S.C. § 226(j) (1982). Thus, under an approved communitization plan, production or operations pursuant to the agreement anywhere in the communitized area are treated as production or operations on each lease committed thereto and will serve

to extend the lease to the same extent as would production or operations which were actually located on the leased lands.

Yet another provision, 30 U.S.C. § 226(g) (1982), provides for the payment of compensatory royalty where Federal lands are being drained by wells drilled on adjacent lands. This section provides that where such an agreement has been entered into, the primary term shall be extended "for the period during which such compensatory royalty is paid" and for 1 year after discontinuance of such payments and so long thereafter as oil or gas is produced in paying quantities. 2/

Appellant admits that there was no production from or actual drilling operations on the lands within its lease. Thus, this lease could only be extended by either constructive production under an approved communitization plan (there being no unit plan involved in the instant case) or by payment of compensatory royalty. While appellant does not expressly argue that his lease is eligible for extension because of constructive production, we will, nevertheless, treat this possibility first.

It is well established that, absent Departmental approval, issuance of a compulsory pooling or spacing order by a state regulatory agency is not effective as to Federal land within the area. See Kirkpatrick Oil & Gas Co. v. United States, 675 F.2d 1122 (10th Cir. 1982). While the actual order entered by the Oklahoma Corporation Commission, by its own terms,

2/ Admittedly, there are additional mechanisms by which a lease may be extended. See, e.g., 43 CFR 3107.6-1 (1982). None of these other provisions is even arguably applicable and, therefore, will not be discussed.

pooled only the royalty interests, without Departmental approval it was ineffective to pool the Federal royalty interest. By the same token, the fact that Mustang, Anderson, and other owners of working interests may have voluntarily agreed to pool their interests is insufficient to pool any Federal interests, absent Federal approval of a communitization agreement.

[1] It is admitted that the communitization plan was not submitted for approval until after the expiration date of the Federal lease. Under the rules and decisional authority in effect on the lease expiration date, no extension was possible where the communitization agreement had not been submitted for approval prior to lease expiration. See Devon Corp., 57 IBLA 131 (1981); Harry D. Owen, 13 IBLA 33 (1973). ^{3/} Under this approach, it is clear that appellant's lease could not be retroactively communitized so as to extend it.

Recent amendments to the regulations, however, have altered the requirement that the unit plan or communitization agreement be submitted prior to lease expiration in order to effectuate retroactive unitization or communitization if and when such plan or agreement is finally approved by the Department. Both parties had adverted to these changes while they were in a proposed state. It would, of course, be improper for this Board to render a decision based on a regulation which had not been finally adopted. Arizona Public Service Co., 20 IBLA 120 (1975). But, while this appeal has

^{3/} It is impossible to ascertain from the text of the decision in Integrity Oil & Gas Co., 42 IBLA 222 (1979), since the date of submission of the communitization agreement to Geological Survey (predecessor of MMS) is not provided, whether that decision was consistent with general Board authority or aberrational. As is explained, infra, in the text, however, any such inconsistency is no longer of particular importance.

been pending, the proposed regulations were promulgated as final rulemaking. Under longstanding Departmental practice, in the absence of third-party rights or countervailing considerations of public policy, amended regulations may be applied to matters pending before the Board where such amended regulations will benefit an appellant. See James E. Strong, 45 IBLA 386 (1980); Henry Offe, 64 I.D. 52 (1957). In the context of the present appeal, since no third-party rights are involved, we think the amended regulation is properly analyzed to ascertain whether it may afford appellant any relief.

Unfortunately, it is clear that the amended regulation, by its express terms, cannot be used to aid appellant. The amended regulation, 43 CFR 3105.2-3 (48 FR 33670 (July 22, 1983)), provides, in relevant part:

Approved communitization agreements are considered effective from the date of the agreement or from the date of the onset of production from the communitized parcels, whichever is earlier. Execution by, or on behalf of, all necessary parties to a communitization agreement covering a Federal lease shall precede the expiration of that lease in order to confer the benefits of the agreement upon it.

Effectively, this regulation has amended past practice so that it is now possible to retroactively approve a communitization agreement to a date prior to the expiration of a Federal lease, even where the agreement is not filed with the Department until after the expiration date of the lease, so long as the communitization agreement is actually executed prior to lease issuance. ^{4/} The problem, however, adverted to by counsel for BLM, is that appellant did

^{4/} It should be pointed out, however, that such a communitization agreement may not be retroactively approved if the Federal lands have been subsequently leased to a different party.

not execute the communitization agreement until after the lease expiration date. Indeed, the record establishes that appellant signed the agreement on March 29, 1982, almost 2 months after lease NM 15072 (Okla.) had expired. Thus, this amended provision is not of assistance to appellant.

[2] It is, therefore, necessary to examine the central argument presented by counsel for appellant, viz., whether the lease was extended by the "demand" for compensatory royalty. BLM contends first, that the letter of the area supervisor, which appellant received on January 29, 1982, did not constitute an assessment of compensatory royalties, and second, even if it did, a lease is subject to extension only where the compensatory royalties have been paid, which they were not, during the primary term of the lease, citing 43 CFR 3107.9-1 (1982). That regulation provided:

The payment of compensatory royalty shall extend the primary or extended term of any lease for the period during which such compensatory royalty is paid, and for a period of 1 year from the discontinuance of such payments, and for so long thereafter as oil or gas is produced in paying quantities.

This regulatory provision closely tracks the statutory language. 5/

Appellant counters this argument by pointing to the MMS manual provision cited earlier as supportive of its interpretation. Appellant notes that not only did the letter of January 27, 1982, assert that compensatory

5/ The recent amendments to the oil and gas leasing regulations have changed the language without altering the substance of this provision. Thus, the regulation now provides: "The payment of compensatory royalty shall extend the term of any lease for the period during which such compensatory royalty is paid and for a period of 1 year from the discontinuance of such payments." 48 FR 33673 (July 22, 1983).

royalties would be assessed if a communitization agreement were not submitted, but, in fact, such royalties, commencing upon production, were effectively assessed as a precondition to MMS' eventual approval of the communitization agreement submitted by Mustang and the other holders of working interests.

The difficulty which arises in analyzing the contentions of the parties in this appeal results from the fact that both sides are partially correct. As we shall explain, a lease is extended not by the mere assessment of compensatory royalties, but by the agreement of the lessee prior to lease expiration to pay such royalties as a precondition to maintaining the lease. On the other hand, we agree that, since BLM never approved a communitization agreement which included lease NM 15072 (Okla.), and, in the absence of an expressed agreement by appellant to pay compensatory royalties, no such royalties may be assessed for the period from production to lease expiration and, therefore, the Department's demand for the same was error.

The applicable statute provides:

Whenever it appears to the Secretary that lands owned by the United States are being drained of oil or gas by wells drilled on adjacent lands, he may negotiate agreements whereby the United States, or the United States and its lessees, shall be compensated for such drainage. Such agreements shall be made with the consent of the lessees, if any, affected thereby. If such agreement is entered into, the primary term of any lease for which compensatory royalty is being paid, or any extension of such primary term, shall be extended for the period during which such compensatory royalty is paid and for a period of one year from discontinuance of such payment and so long thereafter as oil or gas is produced in paying quantities.

30 U.S.C. § 226(g) (1982). It is to be noted that the statute, by its terms, relates to agreements between the owner of the offending well and the United

States, with the Federal lessee as merely an interested third party. In actual practice, however, compensatory royalty payments are made the obligation of the Federal lessee pursuant to 30 CFR 221.21 (1982), as part of the lessee's express obligation to protect the United States from drainage under section 2(c)(1) of the standard lease terms. Thus, section 2(c)(1) provides:

The lessee agrees:

* * * * *

* * * To drill and produce all wells necessary to protect the leased land from drainage by wells on lands not the property of the lessor, or lands of the United States leased at a lower royalty rate, or as to which the royalties and rentals are paid into different funds than are those of this lease; or in lieu of any part of such drilling and production, with the consent of the Director of the Geological Survey, to compensate the lessor in full each month for the estimated loss of royalty through drainage in the amount determined by said Director * * *.

While the lease form and the regulations expressly provide two options, i.e., drilling (or, as here, where drilling is not feasible, submission of a communitization agreement) or payment of compensatory royalty, there is, in fact, a third option: surrender of the lease. Indeed, this option is expressly recognized in the MMS manual:

Although we should have reasonable justification before demanding drilling and assessing compensatory royalty, certain situations may be questionable. However, since the lessee has the right of appeal and may also relinquish all or part of his lease should he disagree with the Supervisor's determination, these questionable situations should be resolved in favor of assessing compensatory royalty and requiring offset protection.

(MMS Manual 641.2.3B).

Inasmuch as a lessee does, in fact, have the option of surrendering the lease, a lessee can only become subject to the payment of compensatory royalties when he has signified his willingness to pay the same. A lessee's silence on this point is, thus, not tantamount to assent. In the instant case, no acquiescence in the assessment of compensatory royalties was manifested during the life of the lease. By such time as the lessee had expressed a willingness to tender compensatory royalties, the lease had expired by its own terms and was no longer subject to extension by payment of compensatory royalty. ^{6/}

Moreover, absent the affirmative assent of lessee, lease NM 15072 (Okla.) would not even have been liable for compensatory royalty assessment as of the lease expiration date. In Nola Grace Ptasynski, 63 IBLA 240, 89 I.D. 208 (1982), this Board analyzed section 2(c)(1) of the standard lease form specifically on the question of when the requirement to pay compensatory royalty arises. Therein, we noted that the purpose of compensatory royalty

^{6/} We wish to make it clear, however, that we do not agree that compensatory royalties must actually have been paid prior to the lease expiration date in order to extend the lease. As a practical matter, assessment of compensatory royalty is made on a monthly basis, after the fact. In order to properly assess such royalty MMS must know the monthly production from the offending well. Thus, a rigid requirement that compensatory royalty must be paid prior to lease issuance would effectively preclude extension for any lease where the offending well began production in the last month of the lease term. We reject this view. Rather, we hold that such leases may be extended provided the lessee informs the Department of his willingness to tender compensatory royalty prior to the lease expiration date.

In this regard, the distinguishing factor between the instant case and the decisions in Chaparral Resources, Inc., 39 IBLA 269 (1979), and Webb Resources, Inc., 38 IBLA 330 (1978), is that in both of those cases, while appellants had expressed a willingness to pay compensatory royalties, there had been no initial determination by the Department that drainage was, in fact, occurring prior to lease expiration. In the absence of such a determination, mere willingness to pay compensatory royalties may not serve to extend a lease.

is to compensate the Government "for production royalties estimated to be lost as a result of a failure to drill offset wells." Id. at 258, 89 I.D. at 218-19, quoting Pan American Corp., IA-1578 (Feb. 29, 1968).

Since the obligation to drill an offset well arises only after the passage of a reasonable time following notification of the offending well, we held that, under the regulations, compensatory royalties are properly assessed only at that point in time, not retroactively to the date of the completion of the offending well. 7/

Normally, in the situation presented by the instant case, where the offending well and the Federal lease are both within the same State authorized spacing unit, there is no problem with this limitation on assessment of compensatory royalties, as the Department will insist on submission of a communitization agreement with an effective date coterminous with the commencement of production. In the present case, however, the unfortunate convergence of the failure of appellant to execute a communitization agreement prior to the lease expiration date, the fact that production commenced immediately before the expiration date, and the fact that appellant failed to agree to the assessment of compensatory royalty prior to lease expiration, have all combined to create a truly bizarre (and, hopefully, unique) situation. In the absence of an approved communitization agreement, the Federal

7/ In Ptasynski, we expressly noted that the Secretary could issue regulations which would authorize the assessment of compensatory royalties from the date of completion of the offending well as an additional incentive to the drilling of offset wells. We merely held that such assessments was not presently authorized by existing Departmental regulations. The MMS Manual provisions which purport to direct such assessments (section 641.2.3C) are not in accord with the present regulation and the Departmental interpretations thereof.

Government has no claim to its pro rata royalty from production of the Dishen #1-17 well, since the State's pooling order is ineffective as to the Federal royalty interest absent the expressed consent of the United States. Nor could the United States sustain a claim for compensatory royalty for the royalties earned prior to lease expiration since, as we have explained, the lessee would not be liable for any such royalties at the time the lease expired, absent his expressed commitment to tender the same. Thus, it would seem that the United States has lost any claim to royalties earned by production from the Dishen #1-17 well.

MMS attempted to avoid this result by approving a communitization agreement on July 15, 1982, with an effective date of November 9, 1981. The problem, however, is that the agreement, as approved, described the subject parcel as "unleased." Contrary to this statement, however, it is clear that, as of the effective date of the agreement, appellant was the lessee of that parcel. While we recognize that communitization agreements are often approved with an effective date which coincides with first production, such agreements cannot retroactively change the underlying facts. The only possible way that the communitization agreement could be approved with an effective date of November 9, 1981, would be if appellant's lease was eligible for an extension under 43 CFR 3105.2-3 (48 FR 33670 (July 22, 1983)) or 43 CFR 3107.9-1. Inasmuch as it was the view of both MMS and BLM that such an extension was not possible, MMS is, indeed, as appellant contends, trying to have it both ways. It is attempting to retain pro rata production for this period while at the same time arguing that appellant's lease expired because no production was allocable to the lease at that time.

We hold that under the facts of this case, the effective date of the approved communitization agreement can be no earlier than the first day that the land was, in fact, unleased, February 1, 1982. It must follow, therefore, that the United States has no claim for royalties from production occurring prior to February 1. We also hold, however, that, contrary to appellant's claim, the lease did expire by its own terms at midnight January 31, 1982.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

James L. Burski
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Will A. Irwin
Administrative Judge

November 30, 1984

IBLA 82-1299 : NM 15072 (Okla.)
80 IBLA 286, 91 I.D. 203 (1984) :
:
BRUCE ANDERSON : Oil and Gas Lease Expiration
(On Reconsideration) :
: Prior Decision Set Aside; Lease
: Held Not to Have Expired

ORDER

By decision dated May 4, 1984, styled Bruce Anderson, 80 IBLA 286, 91 I.D. 203 (1984), this Board affirmed a decision of the New Mexico State Office, Bureau of Land Management, holding that oil and gas lease NM 15972 (Okla.) had expired upon the running of its primary term at midnight on January 31, 1982, in the absence of an executed communitization agreement embracing the subject 40-acre parcel. Since after the expiration date of the lease, we held that the drilling of a successful gas well within the 640-acre spacing unit covering the leased acreage was ineffective to extend the lease beyond its primary terms under 43 CFR 3105.2-3 (1983).

Subsequent to our decision, counsel for appellant filed a petition seeking reconsideration of our holding. In this petition, counsel placed particular emphasis on the regulatory language to the effect that "[t]he original agreement need not be in the form required for approval by the Bureau, but may be any agreement between the lessees and operators, such as an operating agreement, evidencing the intent of the parties to combine, and having the effect of combining, their leases or interests for operation purposes."

Counsel noted that appellant had, in fact, signed a Joint Operation Agreement on February 13, 1981. Counsel pointed out that the appeal had been submitted prior to the change in regulations promulgated on July 22, 1983 (see 48 FR 33670) and stated that the importance which would be attached by the Department to such agreements had not been anticipated. As a result, counsel had not submitted a copy of the Joint Operating Agreement with the appeal.

In light of this showing, the Board, by Order of July 10, 1984, decided to reconsider its original decision. The Board afforded counsel for BLM an opportunity to file an answer an appellant's petition. Counsel for BLM file a response on August 13, 1984. In this response, counsel noted that, inasmuch as the Joint Operating Agreement was executed by appellant and all other holders of working interests prior to expiration of the subject lease, BLM did not oppose holding the lease not to have expired.

80 IBLA 303A

A review of the Joint Operating Agreement submitted with ;the petition for reconsideration shows that it does, in fact, meet the regulatory standard. Thus, it is possible to retroactively approve the communitization agreement which was subsequently submitted to a date prior to the expiration date of lease NM 15072 (Okla.). Considering appellant's substantial expenditures in participating in the drilling of the Dishen #1-17 gas well, we agree that appellant should be afforded the benefit of the amended regulation. See James E. Strong, 45 IBLA 386 (1980). Accordingly, we hereby set aside our prior decision and hold that oil and gas lease NM 15072 (Okla.) was extended beyond its primary term as a result of production obtained from the Dishen #1-17 well. As a necessary corollary, however, inasmuch

as the lease was properly extended, the communitization agreement is properly approved as effective the first date of production, i.e., November 17, 1981, and the United States properly assesses royalty based on pro rata production from that date.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, to the extent that our decision styled Bruce Anderson, 80 IBLA 286, 91 I.D. 203 (1984), held that lease NM 15072 (Okla.) expired upon the running of its primary term, the decision is set aside, the lease is held to have been extended pursuant to 43 CFR 3105.2-3 (1983), and the communitization agreement is approved retroactive to the date of first production of the Dishen #1-17, November 17, 1981.

James L. Burski
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Will A. Irwin
Administrative Judge

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80 IBLA 303B

